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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 487.

UNITED STATES OF AMERICA,
Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
as Owner of the SS. *Alaskan*,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The government's petition asks this Court to review *concurring decisions* of the United States Court of Appeals, Second Circuit, and the United States District Court for the Southern District of New York *upon a question of fact —the valuation of respondent's steamer Alaskan.*

The *Alaskan* was requisitioned by the United States on a time charter basis on June 12, 1942 and was sunk by an enemy torpedo on November 28, 1942, while insured by the United States under a policy of war risk insurance which obligated the United States to pay respondent, in case of a total loss of the vessel, "just compensation therefor * * * determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended." (R.* I, 16-20; R. III, 1141-1157.)

---

* References in this brief preceded by "R." are to the printed transcript of record, the number of the volume of the transcript being indicated in roman numerals followed by the number of the page in arabic numerals.

Section 902(a) of the Merchant Marine Act, 1936, provides, in part, that when a vessel is requisitioned under the authority of the statute, "the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.*" (The wording which is sometimes called the "enhancement clause" has been italicized by us.)

The *Alaskan's* value for purposes of just compensation, both at the time of her requisition and at the time of her loss, was found to be $983,250* by the Commissioner, George W. Alger, Esq., (R. III, 1535-1570), whose report was confirmed by District Judge Leibell in an opinion and supplemental opinion, (R. III, 1580-1625; 85 F. Supp. 815), and affirmed, (one judge dissenting**), by the Court of Appeals, Second Circuit, on the opinions below. (R. III, 1697-1699; 191 F. (2d) 26.)

A second review of the Commissioner's report was made by Judge Leibell before the appeal was argued but after this Court had decided *United States* v. *Cors,* 1949, 337 U. S. 325, construing the so-called "enhancement clause" quoted above. The occasion for his second review was petitioner's motion for a new trial based upon assertions of petitioner's counsel that "additional proofs" were available relating to the application of the "enhancement clause," as construed in *United States* v. *Cors, supra,* to the Commissioner's valuation. (R. III, 1648-1656.) Judge

---

* The parties' valuations ranged from respondent's claim of at least $1,350,000 (R. III, 1538) to petitioner's various figures which were: $879,750 (the valuation offered in 1942 in petitioner's war risk insurance policy as an alternative to just compensation, R. III, 1536), $776,003 (offered as just compensation in 1944, R. III, 1538), and $716,000 or less contended for at the trial (R. III, 1539).

** Judge Clark's dissenting opinion is discussed at pages 14, 30 and 31 of this brief.

Leibell denied the motion for a new trial, setting forth his reasons in an extensive opinion which the Court of Appeals adopted in affirming Judge Leibell's denial of the motion. (R. III, 1657-1678, 1698-9, 1704.)

Questions Presented.

The petition does not present any question of law which has not been settled by this Court, nor any of the other grounds specified in Rule 38(5)(b) of this Court as reasons for exercise of its discretionary power to grant certiorari. On the contrary, the petition admits (p. 2), that the sole question presented is one of fact, namely, "whether * * * the court below improperly approved an award which * * * included enhancement due to the causes which necessitated the taking." That question of fact has thrice been decided against the petitioner in the concurring decisions of the Commissioner, the District Judge and the Court of Appeals, each applying the rules of law approved by this Court in *United States* v. *Cors, supra.*

The questions presented, therefore, are: (1) whether there was substantial evidence of record supporting the concurring findings of fact by the Commissioner, District Judge and Court of Appeals that no deductible "enhancement" was included in the Commissioner's valuation of the *Alaskan;* and (2) whether the Court of Appeals properly held that there was no abuse of discretion by the District Judge in denying petitioner's motion for a new trial to submit "additional proofs" which could have been submitted at the trial and which, even if true, would not, in the opinion of the District Judge, change the result of the original proceeding?

Summary of Argument.

A writ of certiorari merely to review the evidence in cases where no question of law is involved is not granted by this Court, especially when two lower courts have concurred in the findings of fact. *Magnum Co.* v. *Coty*, 1923, 262 U. S. 159, 163; *United States* v. *Johnston*, 1925, 268 U. S. 220, 227; *General Pictures Co.* v. *Western Electric Co.*, 1938, 304 U. S. 175, 178; *Faulkner* v. *Gibbs*, 1949, 338 U. S. 267. The foregoing rule is applicable in this case and the petition should be denied for the following reasons:

1. The rules of law approved by this Court in *United States* v. *Cors* were expressly applied by the courts below in making concurrent findings fully supported by the evidence that no "deductible enhancement" was included in the *Alaskan's* valuation.

2. The Court of Appeals properly affirmed the District Judge's denial of petitioner's motion for a new trial to offer "additional proofs" on the "deductible enhancement" issue.

FIRST POINT.

THE RULES OF LAW APPROVED BY THIS COURT IN *United States* v. *Cors* WERE EXPRESSLY APPLIED BY THE COURTS BELOW IN MAKING CONCURRENT FINDINGS FULLY SUPPORTED BY THE EVIDENCE THAT NO "DEDUCTIBLE ENHANCEMENT" WAS INCLUDED IN THE *Alaskan's* VALUATION.

The interpretation and application given by the courts below to the so-called "enhancement clause" of Section 902 of the Merchant Marine Act, 1936, and the full conformity of such interpretation and application with the

decision of this Court in *United States* v. *Cors*, 337 U. S. 325, readily appears from the opinions and the record.

1. THE RULES OF THE ADVISORY BOARD ON JUST COMPENSATION WERE EXPRESSLY ADOPTED BY THE COMMISSIONER AS THE RULES OF LAW TO BE APPLIED IN DETERMINING JUST COMPENSATION FOR THE *Alaskan*.

Before making findings of fact, the Commissioner quoted (R. III, 1540-1542), the pertinent Rules of the Advisory Board on Just Compensation*, including Rule 4 prescribing the application to be given to the "enhancement clause" in the following terms:

> "Rule 4. From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. *Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted.* In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the

* The Advisory Board consisted of Circuit Judges L. Hand, Parker and Hutcheson and was constituted by Executive Order 9387, dated October 15, 1943. Its report, dated December 7, 1943, is printed in 1943 A. M. C. 1317 and also in the petition (p. 29), as "Appendix B".

foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted." (Italics added.)

After quoting those Rules, the Commissioner stated, (R. III, 1542-3):

> "These rules embody established legal principles which should not only govern the action of the War Shipping Administration but should be here applied in the determination of the present issues.
>
> "We will now consider the facts concerning the *Alaskan* to which these principles are to be applied."

2. THE COMMISSIONER'S METHOD OF VALUATION FOLLOWED PRECISELY THE ADVISORY BOARD'S RULE 3 FOR DETERMINING VALUE "WHERE MARKET VALUE CANNOT BE DETERMINED BY SUFFICIENT SALES * * * MADE AT OR ABOUT THE TIME OF TAKING."

The Commissioner reviewed the evidence regarding respondent's 40-year history as a common carrier and the employment of its large fleet, including the *Alaskan*, prior to its requisitioning by the United States in 1942. (R. III, 1545-6.) He also set forth the construction cost of the *Alaskan*, respondent's acquisition cost (including cost of betterments), her design, equipment, classification, maintenance and good physical condition when requisitioned. (R. III, 1543-1945.) He expressly found her to be capable of substantially as good performance as comparable C-2 vessels built by the government during World War II and of better performance than a "Liberty" vessel. (R. III, 1544-5, 1558.)

Next the Commissioner found (R. III, 1546-7):

> "*There was no sales in 1942 on which the value of the Alaskan could be properly based,* a matter which will be considered later. *Resort has accordingly been made to a wide range of other factual matters* bearing upon that issue, *including potential*

as well as actual earnings of the vessel in prior years as well as the year in which it was sunk, its potential earning power being compared with the vessels currently built by the Government during the war, purporting to indicate that in this respect the *Alaskan* was equivalent to a C-2 and substantially better than a Liberty ship. *The record also includes expert testimony on the cost of replacement of the vessel with allowances for depreciation for its years and testimony of experts, as to value based on earning capacity.* The record also shows the general rates of earning of dry cargo vessels *and the sales of such vessels in years immediately preceding 1942,* which afford a sort of barometer of the shipping industry during those years, particularly showing the trend in prices per deadweight ton of cargo vessels sold." (Italics added.)

After specifically considering the foregoing and the other evidence relating to value, the Commissioner said (R. III, 1562-3):

> *"In reaching a conclusion as to what price would result from negotiations between an owner willing to sell and a purchaser willing to buy* the *Alaskan* in 1942 when it was requisitioned and sunk, *I have taken into consideration all relevant evidence and sought to reach a conclusion which is a reasonable judgment based thereon.* • • • Giving due weight to all the proof submitted before me my conclusion is that the value of the *Alaskan* should be fixed at $95.00 per deadweight ton, or the sum of $983,250." (Italics added.)

The Commissioner's method of valuation was precisely the method prescribed by the Advisory Board's Rule 3, which reads:

> "Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is

to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy."

3. THE COMMISSIONER'S VALUATION WAS BELOW THE 1941 DOMESTIC MARKET PRICES OF LESS DESIRABLE VESSELS AND WAS NOT "SQUARELY BASED * * * ON 1941 VALUES" AS PETITIONER ASSERTS.

Petitioner's thesis is found in its assertion, (p. 15) that "the Commissioner squarely based his award on 1941 values which, as we have just shown, were necessarily inflated by the government's shipping activities."

The implication is that the Commissioner valued the *Alaskan* at 1941 market prices which the petitioner contends and respondent denies, were "enhanced" by government activity.

In fact, however, the very passages of the Commissioner's report cited by petitioner show that the Commissioner considered 1941 market sales prices, (adjusted for the *Alaskan's* advantage over the vessels actually sold), as a mere starting point and only one factor of many on which he based his valuation, for he expressly states that he gave effect to government restrictions in 1941 and 1942 and "all the other factors relating to value." (R. III, 1563.) These covered a "wide range of other factual matters," including "expert testimony on the cost of replacement of the vessel with allowances for depreciation for its years and

testimony of experts as to value based on earning capacity." (R. III, 1546-7.) (Italics added.)

Actually, the Commissioner's valuation of the *Alaskan* as of June and November, 1942 at only $95 per deadweight ton, was considerably below 1941 market value, as he had found that at the peak of the 1941 domestic market in April, 1941, a group of four vessels were sold at an average price of $99.66 per ton and that "none of them compared with the *Alaskan*" in classification status and other particulars. (R. III, 1555.)

The testimony of experts based on earning capacity showed that the *Alaskan* had a value of $130 to $150 per deadweight ton. (R. I, 277-282, 542.) The earnings on which those opinions were based did not "obviously reflect the Government's intervention in the free market," as the petition erroneously asserts. (p. 15.) They included a statement of the earnings* of *all* voyages of respondent's vessels in foreign trade during 1941 and 1942, (R. I, 315-325), *except that voyages made under charters to the United States government were omitted* because the rates in such charters were arbitrarily fixed by the government and were admittedly below market rates. (R. II, 1043, 1097, 1102, 1115.) The financial exhibits showed that the *Alaskan's* earning power *in non-governmental business* was at the rate of $68.40 per deadweight ton or a total of $717,940 per year, before depreciation and taxes. (R. I, 328-331, 424-5; Ex. 30.) Thus the *Alaskan's* earning power *per annum* was 72% of her total value as found by the Commissioner and 159% of the $450,000 which petitioner says was her market value on September 8, 1939.

There was not a shred of evidence that the earnings figures were in any way enhanced by any activities of the

* Government accountants verified the earnings shown in the statement. (R. II, 1014.)

United States government to satisfy its needs either in the particular market for the purchase and sale of vessels or in the market for ocean transportation. On the contrary, these earnings were well within the range of profits of $4 to $6 per deadweight ton per month which were admittedly being realized from charters to commercial operators in 1941, (R. III, 1202) and the record contained the following express admission by Admiral Land, Chairman of the Maritime Commission: "It is true that 1941 was a prosperous year for most steamship companies. This prosperity was not based on monies received from the United States Government, for we were then at peace, and had not requisitioned the merchant fleet, but rather on the great improvement in the steamship business in that year which was worldwide in scope." (R. III, 1225, 1548.)

Earlier in the same statement, Admiral Land had referred to 1941 as "the peak year * * * when vessel owners earned well in excess of $4 per deadweight ton on old freighters and tankers. * * * *In 1941, the values of freighters and tankers had risen to about between $100 and $150* per ton." (R. III, 1224.) (Italics added.)

The only reason given by the Commissioner for so drastically reducing the valuations of respondent's experts was "the effect of the increased restrictions during the Second World War, the Ship Warrants Act* being the principal item in these controls." (R. III, 1557.)

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* The Ship Warrants Act was enacted on July 14, 1941. (50 War Appendix, U. S. C. Sec. 1281.) Respondent contends that the so-called Warrant Act "controls" should be disregarded in determining just compensation because: (1) the Maritime Commission exceeded its powers by requiring observance of unreasonably low charter rates as a condition of obtaining warrants, such rates having been fixed without due process of law and for the admitted purpose of later taking vessels at rates thus arbitrarily depressed; and (2) notwithstanding such "controls", the *Alaskan's* earning power was not in fact reduced.

Thus it is clear that, contrary to the petitioner's assertion, the Commissioner's valuation was below a fair valuation based on 1941 market sales prices and far below her value based on her earning power unenhanced by government activity. His reduced valuation was solely based on his view that government measures taken under the guise of administering the Ship Warrants Act had *depressed* rather than *enhanced* the value of the *Alaskan* in 1942.

Amazingly, in addition to claiming a deduction for alleged "enhancement," petitioner claimed in the courts below and continues to claim in the petition, (footnote, p. 2) that the Commissioner should have attributed an even greater depressing effect than he did, to these activities under the Ship Warrants Act. Thus, petitioner is claiming that the Commissioner should have attributed *both* an enhancing and a depressing effect to petitioner's activities. How the Commissioner could have performed such a feat of self-contradiction is left wholly unexplained in the petition.

4. THE COMMISSIONER'S APPLICATION OF THE "ENHANCEMENT CLAUSE" FAVORED THE PETITIONER RATHER THAN THE RESPONDENT.

Petitioner admits that it "mainly relies" on a claim of enhancement in 1941 market prices "due to the Government's need of vessels which has necessitated the taking." (Petition, pp. 9, 12-15).

No claim has been asserted by the petitioner in the courts below or in the petition of the existence of either of the other two types of deductible enhancement recognized in the Advisory Board's Rule 4, namely enhancement due "to the previous taking of vessels of similar type or to a prospective taking." On the contrary, petitioner admits that there were no takings prior to July, 1941, which was

after the peak of the domestic ship sales market had been reached in April, 1941 (Petition, p. 10), and that petitioners activities under the Ship Warrants Act of July 14, 1941 caused a *decrease* in market values (Petition, p. 14).

(a) So far as 1941 market values are concerned, we have already shown elsewhere* that such values, whether based on market sales or on earnings, were not enhanced by any need of our government for vessels of the *Alaskan's* type, because those values were admittedly based on commercial operations and earnings and because the Advisory Board's Rule 4 specifically provided that "enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted."

We have also shown that, despite the latter provision of Rule 4, the Commissioner's valuation was below the unenhanced 1941 market values and far below the values established by expert testimony on the basis of 1941 earnings for non-governmental business.

Thus it is the respondent, rather than the petitioner, which has ground for complaint concerning the Commissioner's action in respect of 1941 values measured either by market sales or earning power.

(b) The Comptroller General's interpretation** of the enhancement clause as prohibiting "the payment of compensation * * * to the extent that it may be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the National Emergency," was specifically urged upon the Commissioner in the brief of petitioner's trial counsel and is again urged in this Court as correct and as approved by Congress. (Petition, pp.

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* See pp. 8-11, 21-22, 26-30 of this brief.

** 22 Comp. Gen. 497, 608.

20-23.) Petitioner's counsel put in evidence a price index of shipbuilding costs from 1939 onward which the Comptroller General suggests as a measure of permissible enhancement above September 8, 1939 values (R. II, 966-980; Ex. HH.), but there was absolutely no evidence showing any relationship whatever between the changes in the index of costs of building new ships and the current market values of existing ships like the *Alaskan.*

The Commissioner and Judge Leibell were fully justified in rejecting (R. III, 1588-9), the Comptroller General's interpretation not only on the facts, but also because that interpretation was untenable as a matter of law and, indeed, was rejected by this Court in *United States* v. *Cors.* (See pp. 19-20 of this Brief.)

(c) The Commissioner expressly invoked the "enhancement clause" as a ground for disregarding respondent's evidence of ship sales made from and to the government in 1942 at prices far above the Commissioner's valuation of the *Alaskan* at $95 per ton (R. III, 1558-9).

Undisputed evidence showed that the government itself was engaged both in buying and selling vessels in 1942 after its general requisitioning of privately-owned vessels had made the private domestic market virtually non-existent. Newly constructed freighters comparable to the *Alaskan,* (R. III, 1558), were sold by the government to unsubsidized private buyers for $294 per deadweight ton, (R. III, 1118.), and the government itself was contracting for mass-produced Liberty-type vessels inferior to the *Alaskan,* (R. III, 1554-5), at $160 per deadweight ton. Exhibits 6 and E. Certainly no element of "deductible enhancement" could have been present in the prices charged by the government itself.

In addition, the government purchased in 1942 about 315,000 tons of old laid-up vessels from 20 to 40 years old

at an average cost of approximately $130 per deadweight ton (R. III, 1505).

The Commissioner not only found the foregoing sales to be too meager in number to make a market, (R. III, 1549), but he also stated that the enhancement clause of Section 902 was "an additional reason" why such 1942 indicia of value should not be considered.* (R. III, 1562.)

5. IN *United States* v. *Cors*, THIS COURT EXPRESSLY CONFIRMED THE ADVISORY BOARD'S RULES, INCLUDING RULE 4 ON DEDUCTIBLE ENHANCEMENT.

In *United States* v. *Cors*, 337 U. S. 325, this Court reviewed an award of just compensation by the Court of Claims for the government's taking of ownership of the tug *MacArthur* at New York on October 15, 1942. The amount awarded by the Court of Claims was *the tug's full actual market value on the date of taking*, notwithstanding that court's further express finding that market values had risen from two causes: (1) "demand for vessels which followed the outbreak of war in Europe" and "the great increase in shipping and harbor traffic during the period of the war"; and (2) "After May 27, 1941, and particularly after December 7, 1941 * * * the Government's need for vessels, which necessitated the taking of many vessels." (110 Ct. Cls. 66, 77; 337 U. S. 325, at 329, 335.)

This Court, in a 5 to 4 decision, reversed and remanded the case to the Court of Claims stating, page 335: "The findings as to the rising market for tugs in and about the Port of New York tell us that some of the enhancement is

* Judge Clark's statement in his dissenting opinion that the Commissioner used the enhancement clause "to support an increase in value over the 1942 lower point" (R. III, 1701), seems to have been based on some misapprehension of the facts of record.

due to the government's need. But we are left in the dark as to how much it may be."*

In arriving at its conclusion, the majority of the Court found it unnecessary to decide whether the "just compensation" provided for by Section 902 of the Merchant Marine Act, 1936, and limited by the "enhancement clause" was unconstitutional as transgressing the "judicial standard" of just compensation because, they said, "we are satisfied that on the present facts the two are coterminous" (337 U. S. 325, 331-2).

Continuing, the majority pointed out that *market value* as a *prima facie* measure of just compensation was subject to exceptions established in prior decisions, including *United States* v. *Miller*, 1943, 317 U. S. 369, which had excluded from just compensation speculative increases in market value arising from the probable taking and special values available only to the requisitioning authority. After discussing such exceptions, this Court said (p. 332):

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* On remand of the *Cors* case, the government was unable to show any deductible enhancement whatever and the Court of Claims rendered a further decision on April 3, 1951 (119 Ct. Cls. 296), again awarding full market value at the time of taking as just compensation. No further review of that decision was sought by the government. Regarding the evidence on "deductible enhancement," the Court's finding No. 9 was:

> "The evidence as to the amount of deductible enhancement contains many doubtful elements; it omits consideration of material facts; it is based in part on assumptions that are not supported by any evidence, and is so conjectural and speculative that it is impossible to determine the amount by which the market value of plaintiff's vessel was enhanced as a result of the causes necessitating the taking, or to estimate the amount of such enhancement with reasonable accuracy. A careful study of the evidence, however, reflects that during the entire period with which this action is concerned, the enhancement in the market value of the vessel as a result of the Government's need for vessels which necessitated the taking, or as a result of the previous taking of vessels of a similar type, was negligible."

> *"We believe, however, that these exceptions are merely illustrations of a principle which excludes enhancement of value resulting from the government's special or extraordinary demand for the property."* (Italics added.)

Thus, *this Court expressly refrained from making any change in the established judicial standards of just compensation.* The Court merely combined into a single exception certain pre-existing, and theretofore separately stated, exceptions to the market value standard.

The majority of the Court then stated that the enhancement to be deducted is such portion of the *market price* as merely represents "what can be exacted from the Government whose demands in the emergency have created a seller's market" and reflects "speculation as to what the Government can be compelled to pay" rather than "what 'a willing buyer would pay in cash to a willing seller,' * * * in a fair market" (337 U. S. 333-4).

The process whereby such *market price* inflation occurs was described by the Court as follows (337 U. S. 333):

> "* * * In time of war or other national emergency the demand of the government for an article or commodity often causes the *market* to be an unfair indication of value. The special needs of the government create a demand that outruns the supply. *The market,* sensitive to the bullish pressure, *responds with a spiraling of prices. The normal market price* for the commodity *becomes inflated.* And so the *market value of the commodity is enhanced* by the special need which the government has for it." (Italics added.)

The reason for the enhancement exception was stated by the majority as follows, page 333:

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created."

This Court considered the Rules of the Advisory Board on Just Compensation, quoting in full Rule 4 on deductible "enhancement" (pp. 330-1), and expressly approved the Rules in the following passage of the majority opinion, page 334:

> *"What we have said is in accord with our reading of the Report of the Advisory Board.* Any enhancement of value must be deducted where it is due (a) 'to the government's need of vessels which has necessitated the taking,' (b) 'to the previous taking of the vessels of similar type,' or (c) 'to a prospective taking, reasonably probable * * *.'
>
> "The government's need of vessels which has necessitated the taking is its need for the precise ship taken, for the type of class of ship taken, or for ships which perform the same or related functions. The government's need for cargo vessels may affect indirectly the price level of many commodities. It may, for example, affect the price of rowboats. But if the government takes a rowboat, *the enhancement to be excluded is that which results from the government's activities in the particular market.* It is the government's demand in that market that is the measure of the 'causes necessitating the taking or use' in this situation." (Italics added.)

Respondent submits that a fair generalized statement of the majority's holding on the "enhancement" exception in *United States* v. *Cors* is this: In cases where the full actual current market price of property at the time of taking is claimed as just compensation for the taking and where such actual market price is shown to exceed the fair market price because of a speculative or inflationary increase caused

by activities of the government in the particular market for the property to satisfy the government's special need either for the actual property taken or for the same type of property or property performing the same or related functions, then, in such cases, the amount of such excess or enhancement above the fair and reasonable market price is deductible from the full actual market price because it represents an element of value created solely by the government which is not, therefore, justly recoverable from the government.

The foregoing analysis demonstrates the following points regarding the bearing of *United States* v. *Cors* on the *Alaskan* case:

(a) The Commissioner governed himself by a rule of law expressly approved by this Court, when he adopted the Advisory Board's Rule 4 on the interpretations of the "enhancement clause."

(b) There is no foundation for petitioner's assertions (below, R. III, 1650-1), that the *Cors* decision "fundamentally modified" the controlling law on which this case was tried and (in the petition, pp. 23-24), that "the *Cors* opinion clearly changed 'the legal atmosphere'."

(c) The *Cors* decision has no application to the Commissioner's *Alaskan* valuation because: (i) his valuation was not measured by actual market value in 1942 at the time of her taking or at the time of her loss but was a "reasonable judgment" based on many other factors, whereas the *Cors* decision only authorizes deductions for "enhancement" as therein defined where actual current market value is adopted as the measure of just compensation; and, (ii), to the extent that the Commissioner may have considered 1941 vessel market prices as one factor in arriving at his valuation, we have also shown that such

1941 market prices were not increased by any activities of our government in that market to satisfy its needs, but were based on "a general rise in prices or earnings."

(d) The Comptroller General's interpretation of the "enhancement clause" was expressly considered by this Court (pp. 330-1), and was necessarily overruled by the *Cors* decision because this Court only required deduction of such part of the enhancement in the *MacArthur's* market value as was due to "the effect of the government's activities in the particular market" (p. 335). The Court left undisturbed the enhancement due "to the great increase in shipping and harbor traffic because of the war" (pp. 329, 331).

The latter enhancement would apparently be excludable under the Comptroller General's view which would eliminate any values in excess of those prevailing on September 8, 1939, provided such excess be determined as due to *"economic conditions directly caused by the national emergency."*

The Comptroller General's view does not differentiate between "economic conditions" caused by the government's needs and activities in the particular market for the property taken and other "economic conditions" springing from a "national emergency" but having no causal connection with such needs and activities. Nor does he distinguish between increases in value due to a general rise in prices or earnings and speculative, "hold-up" increases created solely by the government's demand for the property. Only the latter type of increases is deductible according to the *Cors* decision.

Moreover, the Comptroller General's interpretation tends to "freeze" ship values as of September 8, 1939, merely because the President had then declared a "limited

national emergency," whereas Rule 4 of the Advisory Board, approved by this Court in the *Cors* decision, expressly states: "neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance."

SECOND POINT.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT JUDGE'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL TO OFFER "ADDITIONAL PROOFS" ON DEDUCTIBLE "ENHANCEMENT."

The petition is but a third attempt by petitioner for a new trial to permit petitioner to present additional evidence.

1. DENIAL OF A MOTION FOR A NEW TRIAL IS REVIEWABLE ONLY ON A SHOWING OF A CLEAR ABUSE OF DISCRETION.

This Court and other federal courts have repeatedly held that denials of such applications will not be reviewed except for clear abuse of discretion. The following are a few of the many decisions to that effect: *United States* v. *Johnson*, 1946, 327 U. S. 106, 111; *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 247; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 1933, 287 U. S. 474, 481; *Holmgren* v. *United States*, 1910, 217 U. S. 509, 521; *Newcomb* v. *Wood*, 1878, 97 U. S. 581, 583; *Kerr* v. *Clampitt*, 1877, 95 U. S. 188, 189; *Indianapolis and St. Louis R. R. Co.* v. *Horst*, 1876, 93 U. S. 291, 301; *Campbell* v. *American Foreign S. S. Co.*, 1941, C. C. A. 2, 116 F. (2d) 926, 928; *McIntyre* v. *Texas Co.*, 1931, C. C. A. 2, 48 F. (2d) 211; *United States* v. *Bransen*, 1944, C. C. A. 9, 142 F. (2d) 232, 235; *American Smelting & Refining Co.* v. *Sutyak*, 1949, C. C. A. 10, 175 F. (2d) 123, 128; *Atkinson* v. *Atkinson*, 1943, C. C. A. 5, 132 F. (2d)

917, 919; *Bateman* v. *Donovan*, 1943, C. C. A. 9, 131 F. (2d) 759, 764; *Atlantic Coast Line R. Co.* v. *Smith*, 1943, C. C. A. 5, 135 F. (2d) 40, 41.

Indeed, as the petitioner's motion for a new trial was really founded on a bare claim of excessive damages in a case where there was no error in respect of the applicable law, the further rule applies that denials of such motions are not reviewable at all. *Fairmount Glass Works* v. *Coal Co.*, 1933, 287 U. S. 474, 481; *Astles* v. *Quaker City Bus Co.*, 1947, C. C. A. 2, 158 F. (2d) 979; 980; *Miller* v. *Maryland Casualty Co.*, 1930, C. C. A. 2, 40 F. (2d) 463; *Searfoss* v. *Lehigh Valley R. R. Co.*, 1935, C. C. A. 2, 76 F. (2d) 762, 763; *Flint* v. *Youngstown Sheet & Tube Co.*, 1944, C. C. A. 2, 143 F. (2d) 923, 924.

2. THE DENIAL OF A NEW TRIAL IN THIS CASE WAS FULLY SUPPORTED BY THE RECORD AND THE *Cors* DECISION.

Any suggestion that it was an abuse of discretion by the District Judge to deny petitioner's motion for a new trial is precluded by the well-reasoned findings and opinion of Judge Leibell (R. III, 1657-1678), and the adoption of his opinion by the majority of the Court of Appeals (R. 1698-9).

Much of the evidence of record which supported the findings and conclusions of the Commissioner was reviewed in Judge Leibell's opinion of March 20, 1950, (R. III, pp. 1666-1675), and it is unnecessary to repeat it. Concluding his review, Judge Leibell found that there was "record evidence on the question of 'enhancement'—sufficient to find that no deductible 'enhancement,' * * * existed prior to May of 1941. The sale prices of vessels in 1941, upon which the Commissioner relied in determining a market value for vessels of the *Alaskan* type in 1941 were sales in December 1940 and April of 1941 (prior to May 1941) and the record

in this case shows that a 'deductible enhancement' based on any government need did not exist prior to that date."

After May, 1941 no "prohibited enhancement" is claimed to have occurred. On the contrary, the petitioner's contention is that its "controls" actually depressed the market values which ships had reached in the first half of 1941.

Judge Leibell characterized the petitioner's proposed "additional proofs" in the following passages (R. III, 1675-6):

> "The evidence which the government would now offer may be classified as follows: matters that were subject to judicial notice at the time of trial; matters already in the record in some other form; additional matter which would show the extent of the government's activities in the market from September 1939 on, as a shipper or berth or space charterer. This additional matter is of doubtful relevancy and would have no probative value on the issue, because it is not precise and limited to the kind of market in which the Alaskan would have to be valued to determine just compensation for her taking. Some of the additional evidence which the government would offer consists of records of sales by the government of surplus or laid-up vessels, and political and legislative matter, which would tend to decrease, not increase, ship values.
>
> "In *United States* v. *Cors*, 337 U. S. 325, 334, the Court held:
>
> > 'The government's need of vessels which has necessitated the taking is its need for the precise ship taken, or for ships which perform the same or related functions. The government's need for cargo vessels may affect indirectly the price level of many commodities. It may for example, affect the price of rowboats. But if the government takes a rowboat, the enhancement to be excluded is that which results

from the government's activities in the particular market. It is the government's demand in that market that is the measure of the "causes necessitating the taking or use" in this situation.'

"Assuming that a basis for reopening this proceeding were established, this additional evidence would not, in my opinion, change the result of the original proceeding. In such circumstances the Court's discretion should be exercised against granting the application. *Marshall's U. S. Auto Supply* v. *Cashman,* 111 F. (2d) 140 (C. C. A. 10th, 1940); *Moore's Federal Practice* (1948 Supp.), §59.02, n. 14.

"Further, this additional evidence, now sought to be presented, was available to the government at the time of the hearing in this action. The government's trial counsel was able and experienced. He turned in a highly creditable brief in support of the exceptions he filed to the Commissioner's report. It seems to me that the government's appeal counsel believed that its trial counsel would have achieved better results if he had made some of the contentions and offered the additional evidence which they now proffer. But that is no reason for granting an application of this kind. The government has had its day in the trial court and as a litigant is entitled to no more. See *Merchants Banking Co.* v. *Cargo of the Afton,* 134 Fed. 727, at p. 731; and *Toledo Scale Co.* v. *Comparison Scale Co.,* 261 U. S. 399, at p. 424."

3. PETITIONER'S PROPOSED "ADDITIONAL PROOFS" IN THIS CASE WERE, IN ANY EVENT, IMMATERIAL IN VIEW OF THIS COURT'S DECISION IN *United States* v. *Cors.*

The soundness of Judge Leibell's conclusion that the so-called "additional proofs" lacked merit is readily shown by testing those "proofs" at their face value against the holdings of this Court in *United States* v. *Cors, supra.* In doing so, we lay aside momentarily, for the sake of

argument, the two further conclusive objections to those "proofs"—i.e., that, as we have shown, they are contrary to the record and actual fact and that, in any case, they concern only 1941 ship market prices, whereas the *Alaskan* was valued as of 1942 at a lower amount.

The petitioner's alleged "additional proofs" boil down to two claims of fact: (1) the *use* of privately-owned American flag cargo ships at unspecified times between September 1, 1939 and December 31, 1941 to transport unspecified quantities of materials for building and supplying foreign bases, of "strategic and critical" materials imported for government stockpiling or as a result of "defense contracts" and for "lend lease" exports (Petition, p. 12); and (2) a rise in ship market prices which, petitioner says, "*must* have been directly due to the Government's *use* of ocean shipping" (Petition, p. 14). (Italics added.)

(a) *The particular market rule in the Cors decision makes immaterial the proposed "additional proofs" relating to the activities of the government in the commodities, munitions and transportation markets.*

In the *Cors* decision, (337 U. S. 325, at 344), this Court said: " • • • the enhancement to be excluded is that which results from the government's activities in the particular market." In this case, the petitioner has asserted "deductible enhancement" in the 1941 domestic market prices for freighters, but none of its proposed "additional proofs" concern activities in that market. Accordingly they would be of "doubtful relevance" and of "no probative value," as Judge Leibell held (R. III, 1675).

The alleged use of freighters referred to in the petition appears to have been: (1) an indirect result of petitioner's activities in the commodity markets for "strategic and

critical materials" imported for government account or in the munitions market for "strategic and critical materials" imported by private business to fill "defense contracts"; or (2) direct activities of petitioner in the ocean transportation market to obtain carriage of materials to build and supply our newly acquired foreign military bases or of lend-lease exports.

Only government activities in the market for the purchase and sale of freighters themselves would be pertinent here. That is a market whose transactions are between owners of existing ships or builders of new ships on the selling side and carriers of goods desirous of buying additional vessels. There is no claim or basis for suggesting that carriers were compelled to buy freighters or paid market prices exceeding those justified by the commercial earning power of the vessels bought or that the market was not a fair market in any other respect. The petition merely says that there was a "spiraling of prices" (p. 13). The word "spiraling", however, is no substitute for lack of evidence that the market prices contained any speculative or "hold-up" element attributable to the needs and activities of our government in the particular market.

Of the three markets in which government activity is claimed to have occurred, the one closest to the ship sales market was the ocean transportation market. But that market is necessarily different from the ship sales market because it is composed of the carriers on one side and the shippers of goods on the other side, and the subject matter is transportation service by ships instead of ships themselves.

Our government's alleged activities in the transportation market were all in our foreign trades, which are part of an international market comprised of a vast multiplicity of transactions between carriers and shippers of many

nationalities who contract for transportation of goods between seaports throughout the world. The soundness of the "particular market" rule excluding evidence of activities of our government in that market is apparent. It would be a manifest absurdity to try to ascertain in a judicial proceeding how prices in that market were affected, if at all, by our government's relatively insignificant activities and to what extent any consequent "enhancement" in transportation prices indirectly enhanced prices in our domestic ship market. The absurdity would be increased by the fact that up to July, 1941, most of our privately-owned freighters were employed in our domestic trades at rates regulated under the Transportation Act of 1940, (54 Stat. 952) or under the Intercoastal Shipping Act of 1933, (47 Stat. 1425; 52 Stat. 964). A rise in domestic market prices of ships stemming from increased earning power in the regulated domestic trades obviously contained no element of "deductible enhancement".

(b) *No "enhancement" could have been caused even by the government's activities in the transportation market because there is no showing of any substantial government activity in that market prior to the passsage of the Ship Warrants Act in July, 1941, under which the government could and did compel transportation of its goods at rates established by the government itself.*

The petition carefully omits to specify the number of privately-owned freighters chartered or the quantity of government traffic claimed to have moved by sea *before* the Ship Warrants Act was passed in July, 1941. Nor does the petition purport to state how the government traffic prior to the Warrants Act compared, in volume, with the total volume of our foreign and domestic traffic or that the government was charged at any time for carriage of

its goods more than the carriers could have obtained for other available traffic.*

After the passage of the Ship Warrants Act on July 14, 1941, proof of government activities in the transportation market would be wholly immaterial in this case because that Act enabled the government to enforce priorities in the carriage of its goods and defense materials at a "fair and reasonable maximum rate of charter hire or equivalent" as provided in Section 2 of the Act (P. L. 173, 77th Congress). The petition admits (p. 14), that the Maritime Commission did, in fact, impose ceilings forcing down charter rates and thereby caused a "decrease in theoretical market value" (p. 14).

Thus, even if any of the needs and activities of the government in the transportation market were pertinent in this case, the petitioner's own claims of fact do not warrant any assumption of "enhancement" in that market as a result of such activities. On the contrary, petitioner admits that during the second half of 1941 the government obtained transportation at less than the going commercial rates, and the record shows that it was not until the latter half of 1941 that the government's need for transportation grew to major proportions. (See Judge Leibell's quotations from government reports, R. III, 1670-1.)

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* In another case, (Smith-Douglass Co. *v.* United States, Court of Claims Docket No. 46289), the government has offered evidence that our total export and import dry cargo, (freighter), traffic was about 49,200,000 tons in 1939, 51,000,000 tons in 1940, and 49,800,000 tons in 1941.

In the same case, the total volume of actual government traffic claimed prior to July, 1941 was: (1) approximately 440,000 tons of Army and Navy traffic in 1940 and approximately 1,094,000 tons in the first half of 1941; (2) stockpiling imports of 130,295 tons in 1940 and 544,000 tons in the first half of 1941; and, (3) lend lease exports of about 124,000 tons in the first half of 1941.

Our total domestic dry cargo traffic in intercoastal, non-contiguous and coastwise trades amounted to about 41,700,000 tons in 1939. Comparable dry cargo figures for 1940 and 1941 have not been published, but the total volume of all domestic traffic, including tanker traffic, was greater in 1940 and 1941 than in 1939.

No claim of unfair gain to carriers at government expense can possibly arise when the government only pays for most of its transportation at lesser rates and never at greater rates than those paid by other shippers of goods.

That being so, it would be absurd to suggest that the market prices of ships themselves were "enhanced" because some unspecified portion of the earnings of some unspecified ships may have been derived from carriage of government traffic in 1939-1941.

4. THE RISE IN DOMESTIC SHIP MARKET PRICES DURING 1939/1941 IS FULLY EXPLAINED BY CAUSES UNCONNECTED WITH ANY NEEDS AND ACTIVITIES OF OUR GOVERNMENT IN THE MARKET FOR SHIPS OR IN THE MARKET FOR OCEAN TRANSPORTATION.

Causes accounting fully for the rise in the domestic market prices of privately-owned American flag and other neutral freighters from the outbreak of war in Europe in September, 1939 through June, 1941 appear in the record. Moreover, such causes were wholly independent of any needs of the government of the United States either for freighters themselves or for ocean transportation by freighters.

During that period the world oversupply of freighters existing in 1939 (R. III, 1196), shrank to the point where the effective supply was insufficient to meet the demands of the world's traffic (R. I, 525-7; R. II, 587, 887; R. III, 1187). By mid-1940, maritime nations having more than half the world's freighters were belligerents. Their freighter fleets were sustaining heavy losses by sinkings, (R. III, 1180) and were being withdrawn from neutral trades, thereby reducing the competition in such trades (Ex. 40, p. 211; R. III, 1197, 1241). The neutral trades, however, were the very ones to which the Neutrality Act

of November 4, 1939 (54 Stat. 4), had diverted our entire freighter fleet engaged in foreign commerce.

During that period also our own domestic supply of freighters was diminished by sales of some 167 privately-owned freighters to alien buyers with approval of the Maritime Commission and by the Commission's own sale to aliens of 47 freighters from its laid-up fleet. (R. III, 1241; also Annual Reports of the Maritime Commission to Congress).

While the supply of ships was thus decreasing, our export and import traffic was increasing both in tonnage and in value, (R. III, 1182) and the earnings of American flag carriers were likewise increasing sharply both in our domestic and foreign trades (R. III, 1231-2; Ex. 40, pp. 422, 426, 428).

Carriage of munitions of war or traffic to and from the combat zones was not a source of any of the earnings of American flag freighters because the Neutrality Act of November 4, 1949, (54 Stat. 4) had excluded our vessels from such zones.

The precipitous rise in foreign market prices of freighters illustrates the worldwide situation in merchant shipping caused by the factors mentioned above. According to a government price chart, foreign prices for 20-year old vessels rose from about $20 per deadweight ton in 1939 to about $155 at the end of 1941 and further to $176 in mid-1942 (Ex. 40, p. 389). Ten specific 1941 foreign sales were also in evidence, averaging $144 per ton, the peak being nearly $200 in September, 1941 (R. III, 1186, 1497-8). Sales in December, 1941 in the Argentine market were mentioned at $453 per deadweight ton (R. I, 525). This rise in foreign ship markets could hardly have had any connection with the relatively insignificant demands of our government for ocean transportation in our own export and import trade.

None of the foregoing facts is even mentioned or suggested in the petition. Yet those conditions were operative long before our government's activities in the market for ocean transportation had attained any significance and they fully justified the finding of the District Judge that there was "record evidence on the question of enhancement—sufficient to find that no deductible 'enhancement' * * * existed prior to May, 1941" (R. III, 1674). None could have occurred after that date because the peak of the domestic ship market had occurred in April, 1941. See p. 9 of this brief.

5. JUDGE CLARK'S DISSENT WAS BASED ON ERRONEOUS ASSUMPTIONS OF FACT AND LAW.

Judge Clark's fundamental error of fact was his assumption that the mere doubling of the *Alaskan's* value between September, 1939 and mid-1942 "belies" a conclusion that "all enhancement of value due to the government's need for shipping * * * has been rigorously squeezed out." He apparently assumed that the doubling of value was connected with the lend lease program and government defensive efforts (R. III, 1700-1). He further assumed that there had been a "vast increase in value during and *due* to the defense efforts of 1939-1941" which the Commissioner had ignored.

Those assumptions of fact were, as we have shown, not only unsupported by the record but were actually contrary to it.* They can only be explained as misconceptions.

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* Also directly contrary to Judge Clark's assumptions is the fact that *during 1939/1941 freighter earnings more than doubled in the domestic intercoastal trade* where rates were regulated by the Interstate Commerce Commission and where no "defense" activities of the government are even claimed to have occurred. The earnings of respondent's vessels engaged in that trade were (before overhead, depreciation and federal taxes) $1.58, $2.23 and $3.27 per deadweight ton for the last quarters of 1939, 1940 and 1941, respectively. (Ex. 40, pp. 422, 426 and 428.)

In addition to being founded on misconceptions of fact, Judge Clark's dissent also seems to view the "enhancement clause" as authorizing deduction of any enhancement in the market value of ships "due to the defense efforts" regardless of whether such efforts or activities were in other markets or whether the enhancement arose from earnings fairly gained. Such a view is clearly incompatible with this Court's *Cors* decision which confirms market value as a measure of just compensation, except to the extent of any unfair or "hold-up" element therein created *solely* by the government's special demands and activities in the particular market for property taken.

Nowhere in his opinion does he specify any tangible misapplication of the Advisory Board's Rules and the decision of this Court in the *Cors* case to any facts in the record. In fact, it is impossible to obtain a notion of what concrete method of application of the enhancement clause he suggests should be made in this case. He merely states his view that the Commissioner "needed to make a definite finding as to enhancement of value in the statutory sense and the amount thereof as required in the *Cors* case" (R. III, 1703-4).

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

February, 1952.

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